

United States District Court  
Southern District of California

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. ) Case No. 10-CR-4246 JM  
) Status Hearing  
BASAALY SAEED MOALIN, ) Wednesday, August 22, 2012  
MOHAMED MOHAMED MOHAMUD, )  
ISSA DOREH, )  
AHMED NASIR TAALIL MOHAMUD, )  
)  
Defendants. )  
\_\_\_\_\_ )

Before the Honorable Jeffrey T. Miller  
United States District Judge

Official Interpreter: Ayderus Ali, CCI  
Official Court Reporter: Debra M. Henson, CSR, RPR  
U.S. Courthouse  
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Record produced by stenographic reporter

1   Appearances

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23   (Mr. A. Mohamud)         Thomas A. Durkin, Esq.  
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1           San Diego, California - Wednesday, August 22, 2012

2           (Defendant Mr. A. Mohamud is being assisted by Somali  
3 interpreter Ayderus Ali.)

4           THE CLERK: Calling matter 1 on calendar,  
5 10-CR-4246, USA versus Basaaly Saeed Moalin, Mohamed Mohamed  
6 Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, for motion  
7 hearing.

8           THE COURT: Counsel, why don't we wait until the  
9 defendants are present, and everyone can state their  
10 appearances. Thank you.

11           MS. MORENO: Good morning, your Honor. If I may  
12 address the Court. We haven't had the ability -- if we may  
13 just briefly discuss the new arraignment with our clients. I  
14 didn't have the chance to go back and explain to Mr. Mohamud  
15 that he's going to be arraigned on the superseding  
16 indictment.

17           THE COURT: Okay.

18           MS. MORENO: I didn't know it was going to happen  
19 this morning. If I can have a moment, please, your Honor.

20           THE COURT: Sure.

21           MS. MORENO: Thank you.

22           (Brief pause in the proceedings.)

23           THE COURT: All right. I think counsel have had an  
24 opportunity to briefly confer with their clients. Would  
25 counsel please state their appearances.

1 MR. COLE: Yes. William Cole and Caroline Han for  
2 the United States, your Honor.

3 MR. DRATEL: Good morning, your Honor. Joshua  
4 Dratel and Alice Fontier for Mr. Moalin.

5 MS. MORENO: Good morning, your Honor. Linda  
6 Moreno on behalf of Mr. Mohamud, who's present in custody.

7 MR. GHAPPOUR: Good morning, your Honor. Ahmed  
8 Ghappour on behalf of Issa Doreh.

9 MR. DURKIN: Good morning, Judge. Tom Durkin on  
10 behalf of Nasir -- Ahmed Nasir Taalil Mohamud, who's also  
11 present in custody.

12 THE COURT: All right. Thank you. And he's  
13 present in custody and utilizing the services of a Somali  
14 interpreter the record should reflect.

15 All right. This is the time set for our latest  
16 status conference, and it's also the time that defense  
17 counsel have requested a hearing on the Rule 15 motion, and  
18 perhaps we can address that at this point. There may be  
19 other matters we need to address, but we can address the Rule  
20 15, at least give counsel an opportunity to argue or  
21 highlight any concerns or points they want to make.

22 I should tell counsel, counsel should know, that  
23 I've thoroughly reviewed the papers, all the papers, with  
24 respect to the Rule 15 motion, so there's no need to merely  
25 repeat what you have in your papers, but as I say, if there's

1 something you'd like to highlight or an additional point to  
2 be made, you may certainly proceed.

3 MR. DURKIN: Judge, one other matter. We had filed  
4 a motion, a renewed motion --

5 THE COURT: If I can ask counsel to use the  
6 lectern, I think it will be -- yes, let's proceed with the  
7 arraignment on the second superseding indictment. Let's do  
8 that initially, and then we'll proceed to the Rule 15 and  
9 hear other matters. I would ask counsel to either pull  
10 microphones very close to them if they wish to remain seated  
11 or use the lectern microphone there.

12 MR. DURKIN: Judge, there was one other issue. We  
13 had filed a motion, a renewed motion for stay or, in the  
14 alternative, continue the trial date, and we have filed an  
15 unopposed application to shorten the notice requirement.

16 THE COURT: Well, let's take up that matter as one  
17 of several that we'll take up.

18 MR. DURKIN: I just thought it might make more  
19 sense at the tail end of the Rule 15 for us to take that up  
20 as well.

21 THE COURT: Well, I'll address it. You'll have an  
22 opportunity, Mr. Dratel -- excuse me, Mr. Durkin -- to be  
23 heard on that.

24 MR. DURKIN: Thank you.

25 THE COURT: Okay. Why don't we proceed with the

1 arraignment.

2 THE CLERK: Basaaly Saeed Moalin, is that your true  
3 name?

4 DEFENDANT MR. MOALIN: Yes.

5 THE CLERK: You are informed that a second  
6 superseding indictment has now been filed charging you with  
7 conspiracy to provide material support to terrorists,  
8 conspiracy to provide material support to foreign terrorist  
9 organization, conspiracy to launder monetary instruments,  
10 providing material support to terrorists, and providing  
11 material support to foreign terrorist organization. Have you  
12 received a copy of the second superseding indictment?

13 MR. DRATEL: Yes, your Honor, we've received it,  
14 I've reviewed it -- we've reviewed it -- Ms. Fontier and I  
15 reviewed with Mr. Moalin.

16 THE CLERK: Do you waive further reading?

17 MR. DRATEL: Yes, waive further reading.

18 THE CLERK: Mr. Mohamed Mohamed Mohamud?

19 DEFENDANT MR. M. MOHAMUD: Yes.

20 THE CLERK: Is that your true name?

21 DEFENDANT MR. M. MOHAMUD: Yes, that my name.

22 THE CLERK: Issa Doreh?

23 DEFENDANT MR. DOREH: Yeah, I'm here.

24 THE CLERK: Is that your true name?

25 DEFENDANT MR. DOREH: Yes, ma'am.

1 THE CLERK: You're each informed that a second  
2 superseding indictment has now been filed charging you with  
3 conspiracy to provide -- to provide material support to  
4 terrorists, conspiracy to provide material support to foreign  
5 terrorist organization, conspiracy to launder monetary  
6 instruments, and providing material support to foreign  
7 terrorist organizations. Have you received a copy of the  
8 second superseding indictment?

9 MS. MORENO: Yes.

10 THE CLERK: Do you waive further?

11 MS. MORENO: So waived.

12 THE CLERK: And as to Mr. Issa Doreh?

13 MR. GHAPPOUR: Yes, and so waived.

14 THE CLERK: Thank you. Mr. Ahmed Nasir Taalil  
15 Mohamud, is that your true name?

16 DEFENDANT MR. A. MOHAMUD: Yes.

17 THE CLERK: You're informed that a second  
18 superseding indictment has now been filed charging you with  
19 conspiracy to provide material support to terrorists,  
20 conspiracy to provide material support to foreign terrorist  
21 organization, and conspiracy to launder monetary instruments.  
22 Have you received a copy of the second superseding  
23 indictment?

24 MR. DURKIN: Judge, we'll acknowledge receipt of a  
25 copy of the indictment. We've reviewed it, and we would

1 waive formal reading thereof and enter pleas of not guilty.

2 THE COURT: Thank you.

3 THE CLERK: Thank you. You are each further  
4 advised that you're entitled to a trial by jury, to be  
5 represented by counsel at all stages of the proceedings  
6 before this Court, and to have witnesses summoned to testify  
7 on your behalf.

8 How do you now plead to the second superseding  
9 indictment, guilty or not guilty? Mr. Basaaly Saeed Moalin,  
10 as to Count 1, 2, 3, 4, and 5?

11 MR. DRATEL: Not guilty.

12 THE COURT: All right. A not-guilty plea will be  
13 entered with respect to all counts by defendant Moalin.

14 THE CLERK: Mr. Mohamed Mohamed Mohamud, as to  
15 Counts 1, 2, 3, and 5, guilty or not guilty?

16 MS. MORENO: Not guilty.

17 THE COURT: A not-guilty plea will be entered with  
18 respect to those counts charging the second defendant,  
19 Mohamed Mohamed Mohamud.

20 THE CLERK: Issa Doreh, as to Counts 1, 2, 3, and  
21 5, guilty or not guilty?

22 MR. GHAPPOUR: Not guilty.

23 THE COURT: A not-guilty plea will be entered with  
24 respect to each of the counts charging defendant Issa Doreh.

25 THE CLERK: Ahmed Nasir Taalil Mohamud, as to



1 Counts 1, 2, and 3?

2 MR. DURKIN: Not guilty.

3 THE COURT: And a not-guilty count will be entered  
4 on behalf of Mr. Ahmed Mohamud with respect to each of the  
5 counts brought against that defendant, defendant number 4,  
6 Mr. Mohamud.

7 Okay. Moving to the -- to the Rule 15 matter.  
8 Counsel, are there any further arguments you wish to make or  
9 underscore in connection with that pending motion?

10 MS. FONTIER: Yes, your Honor. Your Honor, when I  
11 was packing up the hard copies of these motions to come here,  
12 I was honestly shocked by the amount of paper we managed to  
13 put together on these motions, so I do appreciate your having  
14 read through everything; and I certainly won't burden the  
15 record with a full argument on each of these issues, but I do  
16 think that there are several things that are worth  
17 highlighting and also noting for the Court.

18 And I want to first start out by saying that since  
19 filing these and since receiving the government's response  
20 and reaction, we have been doing ongoing investigation into  
21 alternatives and other locations as well as alternate means  
22 by which these may be done. And Ms. Moreno is going to  
23 address any questions that you have about alternatives to a  
24 location if your Honor feels that the S.K.A. facility is out  
25 of the question.

1 THE COURT: Well, Ms. Fontier, let me state  
2 something here at the threshold of your arguments. I don't  
3 see the position of the Court negotiating with the parties at  
4 this point as to what is going to be acceptable and what is  
5 not going to be acceptable. All I have before me is the  
6 pending motion.

7 MS. FONTIER: Yes, your Honor.

8 THE COURT: And I know that there have been some  
9 casual and intermittent suggestions in your papers as to what  
10 might fly if the thrust and the core of your motion as it  
11 relates to taking these depositions in Somalia adjacent to  
12 the airport are unsuccessful. I can only -- I can only react  
13 to what's before me, and -- and also it's important to  
14 consider the right of the government to file an opposition to  
15 a formed and detailed alternative, if that's what you're  
16 utilizing or thinking about at this particular point in time.  
17 So to take this as an opportunity to state fallback positions  
18 without giving the Court an opportunity to look at what's  
19 being proposed, without giving the government an opportunity  
20 to oppose or not oppose I think is a nonstarter at this time.

21 MS. FONTIER: Yes, your Honor. And it is -- let me  
22 be clear that it is our position, as stated in the papers,  
23 that for each of these witnesses, first, that they are likely  
24 to be unavailable; that their information is material and  
25 exculpatory; that these Rule 15 depositions should be

1 granted; and that there is a location at which we interviewed  
2 them to begin with, the S.K.A. facility by the airport in  
3 Somalia, that is an appropriate place that we have already  
4 secured and that we have talked to members of the T.F.G. and  
5 are able to get a magistrate, we're able to get an  
6 interpreter into that facility. We're ready to go as far as  
7 we're concerned as to the S.K.A. facility, and that is  
8 certainly our first choice, and that is what we would like to  
9 have happen.

10           So before putting the cart before the horse though,  
11 let me go back to the actual motions. And, your Honor, I  
12 think the government raised multiple concerns which I don't  
13 think have actual merit on these issues. The question before  
14 the Court is really whether this is the type of case where  
15 there are exceptional circumstances and it would be unjust to  
16 not grant those depositions.

17           Of course, there are certain factors that the Court  
18 has to look into. I'm not going to run through each of those  
19 again, but the issues that the government has raised, the  
20 timeliness issue I think is set forth very clearly in our  
21 reply that -- that is not really lack -- their timeliness  
22 argument lacks in merit. We're not on the eve of trial, as  
23 has happened in some of the other cases, or a week before  
24 trial; we are still two months, three months before trial.

25           THE COURT: But in the papers you filed, you

1 indicated that if these depositions are granted, it would  
2 necessitate a delay of the trial. So it really doesn't make  
3 any difference whether they're actually brought at the 11th  
4 hour and 59th minute, which they're not, but they have been  
5 brought three and a half months after the initial indication  
6 from defense counsel that foreign depositions were being  
7 considered.

8 MS. FONTIER: Your Honor, we have been obviously  
9 on -- working on this case and going through the very  
10 voluminous discovery dealing with the, you know, 1800 Somali  
11 phone calls and trying to establish --

12 THE COURT: That's a separate issue --

13 MS. FONTIER: Right.

14 THE COURT: -- that's a separate issue. But your  
15 argument began to assume I think, looking at the subtext of  
16 it, that you're not bringing this motion too late, that it's  
17 brought in sufficient time prior to trial. But that runs  
18 against what has been set forth in the papers, that if for  
19 some reason the Court were to grant these depositions  
20 ultimately in an order, that the trial would have to be  
21 continued once again. So I think that's the position that  
22 I'm looking at, or the practical effect of keeping the  
23 current trial date secure. Doesn't seem that that would  
24 happen if the depositions go forward.

25 MS. FONTIER: It would certainly be -- it would

1 certainly be difficult, your Honor. It would certainly be  
2 difficult to --

3 THE COURT: Well, there's been a -- there's been  
4 request for a stay on the part of one of the defendants if in  
5 fact the motion is granted; there's been a request for a stay  
6 of all proceedings while further investigation takes place  
7 and the depositions be arranged. Now, I know that there's  
8 perhaps another basis for the request for a stay, but it  
9 doesn't -- in any event, I think the point was made that were  
10 there depositions to go forward, there would be very little  
11 chance of keeping the trial date.

12 MS. FONTIER: And I will allow Mr. Durkin to  
13 address his motion to stay with your Honor. In reality,  
14 there would be -- it would be very difficult. Is it  
15 completely and totally out of the question for us to go to  
16 Somalia in September and take these depositions? Perhaps  
17 not. It would be extremely difficult. And I think that it  
18 would probably be more difficult for the government to make  
19 their own arrangements in that amount of time. We know where  
20 we're going and we've been there. We know how to -- what --  
21 we can make the arrangements.

22 But that is I think also a secondary issue to the  
23 fact of -- what is the true concern in all of the cases is  
24 whether these witnesses are likely to be unavailable -- not  
25 conclusively unavailable but likely to be unavailable -- and

1 whether or not their testimony is material to a fact at  
2 issue. And these witnesses, all eight of them, are Somali  
3 nationals who are in Somalia who do not have current visas or  
4 the ability to travel to the United States. And, in  
5 addition, since the time that we filed these, we've been back  
6 in contact with them, and each of these eight witnesses has  
7 stated, for various reasons, that they are unable or  
8 unwilling, and unwilling, to come to the United States. And  
9 under the current case law, that is sufficient for a showing  
10 of unavailability to admit their depositions, not merely just  
11 to take them. They've already -- we can already establish  
12 the higher standard for admitting a deposition, and that's  
13 not even what's at issue here.

14           Really, what we're concerned about is whether or  
15 not their testimony should be preserved in the event that  
16 they are in fact unavailable at the time of trial. And that  
17 I think is very obviously met in these circumstances where  
18 these -- Somalia is just not a place where visas are  
19 regularly granted, where someone can just, you know, hop on a  
20 plane. It's not like coming from Canada or France. You  
21 know, these are not visa waiver or passport waiver countries.  
22 In fact, it I think -- I believe it's in our papers -- is the  
23 country with the second highest rate of visa refusals. In  
24 addition, the passports that people do have are not  
25 recognized by the United States government. They have to get

1 a passport waiver in addition to trying to get a visa. I  
2 mean the hurdles are immense, and there are things that are  
3 not likely to ever be able to be done.

4 So in a nutshell, the fact that these are Somali  
5 nationals in Somalia makes them likely to be unavailable and  
6 meets that prong of the Court's decision on whether or not  
7 these depositions should be granted.

8 The second is to the materiality. And it just  
9 defies logic and reason to say that these witnesses are not  
10 material. Just starting -- well, let's take two of them for  
11 the -- to start with, who are I think are beyond question  
12 that their testimony is material. The first is Hassan Guled,  
13 whose nickname is Sheikalo (phonetic). For the first four  
14 transfers in the new superseding indictment in which these  
15 defendants have just been arraigned went to Sheikalo, the  
16 person who Mr. Moalin is talking to on the phone, who is  
17 Sheikalo. He received those first four transfers in the  
18 superseding indictment. We believe that we know who that  
19 person is, have spoken to him, and he will be able to testify  
20 about whether or not that is in fact him, if he received the  
21 money, what he did with it. There is no question that that  
22 is material evidence. And the government's argument to the  
23 contrary that this is patently incredible is, first of all,  
24 not actually the issue; whether or not these are credible  
25 witnesses is a question of fact for the jury. And second of

1 all, their evidence that they base that on we take serious  
2 issue with. I do not believe, based on information received  
3 from our certified translator, that their rendition of the  
4 evidence, their phone call, is in fact accurate. Their  
5 transcripts do not accurately state what was said in Somali  
6 between Mr. Moalin and the person on the other end of the  
7 phone. And we are still in the process of getting many more  
8 of these calls translated, but there are fundamental,  
9 material differences. And so just to say -- to accept their  
10 transcripts as fact, as evidence --

11 THE COURT: I don't think you have --

12 MS. FONTIER: -- and say that this is not a  
13 credible --

14 THE COURT: I don't think you have that --

15 MS. FONTIER: -- witness is not appropriate.

16 THE COURT: -- in your motion papers, did you,  
17 counsel?

18 MS. FONTIER: I'm sorry, your Honor?

19 THE COURT: I don't think I saw in your motion  
20 papers that you were taking issue with the accuracy of  
21 translations.

22 MS. FONTIER: We received the transcribe and  
23 translate of that specific phone call, the January 20, 2008  
24 phone call, on Monday. What we said in our reply is that  
25 this is a question of fact for the jury and the prosecution



1 cannot just decide that this is an incredible witness and  
2 then say that that makes them nonmaterial.

3           So the basis for what I'm saying, the argument, the  
4 law is in our reply, but the facts on which we base that,  
5 this actual transcript was received on Monday. So, no, that  
6 transcript that I'm referring to is not in our motion papers.  
7 But there -- it goes -- the credibility of them anyway is  
8 actually a side issue, which, again, is what we have a jury  
9 trial for is to decide whether these are credible or not,  
10 whether the government's evidence is credible or not. It  
11 doesn't matter ultimately what the government thinks about  
12 how credible these witnesses may or may not be to whether or  
13 not they are material.

14           Myself and Mr. Ghappour went to Somalia. We were  
15 at the S.K.A. facility for five days interviewing these  
16 witnesses. We met with each of them individually. We had  
17 extensive conversations with them. We are -- it is as an  
18 Officer of the Court that I filed a declaration with my name  
19 on it with my belief about what these individuals would say,  
20 and that is based on my personal knowledge from interviewing  
21 them and meeting with them. And the information that is in  
22 the declaration, which we had originally filed ex parte  
23 because it's so -- it is our defense, but we decided to  
24 provide to the entire Court and to the government to avoid  
25 any sort of issue with that, is evidence that absolutely

1 forms the basis of a defense. It is exculpatory -- it's  
2 completely exculpatory. But even that, it is -- to not have  
3 the information that these witnesses will provide is to deny  
4 us the right to present a defense.

5 This government is prosecuting a global case.  
6 They're prosecuting these men for what happened in Somalia.  
7 As their defense attorneys, we must have the ability to --  
8 not only to investigate and learn things for our own benefit,  
9 but then to present that evidence to the Court. We must have  
10 that ability. And this is exculpatory evidence.

11 The second witness that I just want to highlight  
12 is -- he's -- in all the papers he is named as Farah Yare,  
13 Y-a-r-e. His name is actually Farah Shidane. He is  
14 unindicted co-conspirator number 1. The government's  
15 allegations -- I don't remember the exact number, but a  
16 number of the transfers that are in the superseding  
17 indictment went directly to Farah Yare, to Mr. Shidane. He  
18 is able to testify about who he is, what he was doing, what  
19 his role was in the local administration in Somalia, what he  
20 specifically did with the money that was received; he can  
21 testify to that. If that is not material testimony, then  
22 material testimony doesn't exist. It is the absolute  
23 definition of materiality.

24 And in order -- again, what the government sort of  
25 seems to be hoping is that we don't get to present a defense,

1 that we just have to deal with their evidence, accept what  
2 they say these transcripts say and deal with it. But that's  
3 not exactly how the adversarial process works. Quite certain  
4 that the Sixth Amendment provides us the right to present a  
5 defense, the right to put on evidence, the right to call  
6 witnesses. And the only means by which we have to call these  
7 witnesses is the Rule 15 depositions. If we could go pick  
8 these witnesses up and bring them to court, that would be  
9 preferable to us. We cannot do that, so the only alternative  
10 in these exceptional circumstances to promote anything close  
11 to a fair and just trial for these men is to grant these Rule  
12 15s. These witnesses are unavailable, their testimony is  
13 absolutely material.

14 Now, I'm not going to go through the remaining six  
15 witnesses but, your Honor, they are also, for the various  
16 reasons that are stated, material and unavailable, willing to  
17 be deposed in Somalia or in an alternate location -- but,  
18 again, I won't go into that at the moment. They are willing  
19 to do that. They cannot come here.

20 And, your Honor, it also is -- you know, if we're  
21 ultimately going to go to Somalia and do Rule 15 depositions  
22 of one person, you know, it doesn't seem logical to me to say  
23 well, you should only do one or you should only do two. All  
24 the witnesses are there. We can do these depositions.

25 And, again, another point that -- I think the

1 government keeps confusing in their papers this standard for  
2 taking a deposition with the standard for admitting a  
3 deposition. If ultimately the government circumscribes their  
4 proof so much that they only admit evidence of the eight  
5 transfers that are in the -- in the indictment and they admit  
6 nothing else on background or anything else, then only the  
7 two witnesses that relate to that will be relevant, and then  
8 only that testimony would be admissible. But that doesn't  
9 make -- the chances of that happening I think are slim to  
10 none. And even if that were the case, it doesn't bear on  
11 whether or not we should preserve the other witnesses'  
12 testimony in the event that it is relevant and admissible at  
13 the time of trial. Those are questions that can be asked at  
14 a later point.

15           So their arguments about the credibility, about the  
16 admissibility, about the weight of the evidence, all of those  
17 things are either for a later point or for the jury, but they  
18 don't go to the question of whether these should be taken.  
19 And I think ultimately, your Honor, I submit to you that  
20 there is no possible way for a defense to be presented for  
21 these men in a fair and just way without these depositions,  
22 and I think that your Honor should grant them for that  
23 purpose. And, your Honor, I'm happy to answer any questions  
24 that you may have about any of this or I can happily sit  
25 down.

1 THE COURT: Okay. Thank you. I'll give the  
2 government an opportunity to respond.

3 MR. DRATEL: Your Honor, may I say a couple of  
4 things that --

5 THE COURT: Please don't repeat what's --

6 MR. DRATEL: I'm not going to repeat.

7 THE COURT: -- already been --

8 MR. DRATEL: I'm not going to repeat at all.

9 THE COURT: Okay.

10 MR. DRATEL: Just two things. One is with respect  
11 to the issue of timeliness, we had anticipated actually doing  
12 these depositions during this two-week period. We'd all  
13 allotted the last two weeks of August to perhaps doing it,  
14 and perhaps we didn't anticipate how long the whole process  
15 of resolving the motion, but we -- there was nothing dilatory  
16 about how we proceeded, and we alerted everyone that we were  
17 planning on doing this, including telling the government that  
18 the last two weeks of August were -- were available and that  
19 we would try to do it during that period.

20 The point about the delay in the trial is that  
21 this -- no one wants to delay the trial. The defendants are  
22 the ones who are prejudiced by a delay of the trial. I don't  
23 think the government has any prejudice if the trial is  
24 delayed. But this evidence is so important, it is so  
25 essential to a fair trial, to a fair adjudication of this

1 case that we would be willing to countenance a delay if it  
2 means getting these depositions. That's our position. We're  
3 not -- we're not looking to delay the trial. And potentially  
4 it maybe can be done in the -- before the October 15 date in  
5 another context. And I'm -- and I'm not just going here by  
6 experience with Rule 15s in other -- in other situations is  
7 that we're not asking the Court to negotiate in the context  
8 of an alternative, but there are alternatives in the context  
9 of relief.

10           The key relief is getting the depositions. The  
11 logistics of it is less important. It's not really a  
12 question of relief because if we're talking about going to  
13 Djibouti, which we determined the witnesses can go, if we're  
14 talking about going to Kenya, Nairobi, where the witnesses,  
15 it turns out, can go, that eliminates the safety issue  
16 100 percent. Djibouti has an enormous U.S. presence --

17           THE COURT: Once again, Mr. Dratel, those issues  
18 aren't before me. And when you were last here in early  
19 April, I asked everyone to see Judge Gallo so that discovery  
20 could be managed. I indicated to you at the time that he  
21 would be out for about a week but that the Court would  
22 appreciate all counsel going to Magistrate Judge Gallo so  
23 that discovery could be arranged. You went down to chambers,  
24 he wasn't in, but there was never any follow-up. The parties  
25 did not allow the issue of Rule 15 depositions or some

1 substitute therefor to be discussed. By "substitute  
2 therefor" I mean some other alternative to what the core and  
3 thrust of this particular motion is.

4           It is accurate for you to say that during our last  
5 status conference, you indicated that you'd be looking into a  
6 filing a Rule 15 motion. Of course, the Rule 15 motion could  
7 have been filed much earlier than the date it was filed,  
8 July 20, but there were three and a half months that went by  
9 without that Rule 15 motion being filed, and there was no  
10 follow-up with Judge Gallo, and that is truly unfortunate;  
11 that is not what this Court had in mind when it suggested  
12 that the parties allow Magistrate Judge Gallo to manage  
13 discovery here. So obviously at the time the new trial date  
14 was set for late October, it was set with the Court  
15 indicating to all concerned this was a firm trial date. And  
16 there was certainly good reason to continue the trial date,  
17 the earlier time. I mean I know you've been negotiating your  
18 way through an awful lot of discovery, and there are  
19 practical considerations that I think you've ably dealt with.  
20 But, quite frankly, when you're talking about the timeliness  
21 of this Rule 15 motion, to the extent timeliness is relevant  
22 in this analysis, I have real concern as to whether or not  
23 this Rule 15 motion was brought in a timely fashion.

24           MR. DRATEL: Well, your Honor, if I may address  
25 that. One is that -- just one logistical issue, which is

1 that you can't file on ECF with the magistrate, so we had to  
2 file the motion with the Court --

3 THE COURT: Obviously.

4 MR. DRATEL: -- which we did. But the issue of --  
5 we were not in a position to identify the witnesses, identify  
6 what they would testify about until the trip to Somalia, and  
7 also whether they could be done in Somalia at all until the  
8 trip was made and then there was a return.

9 THE COURT: Why do you say there was difficulty in  
10 identifying the witnesses when it was your clients who knew,  
11 allegedly, who they were talking to and for what purposes? I  
12 mean your clients have told you, presumably, who they were  
13 talking to and where these people could be located.

14 MR. DRATEL: But it's more than that, your Honor.  
15 We have additional witnesses -- we knew Farah Yare, yes, but  
16 we didn't know whether we were able to locate these people,  
17 sit down and talk to them, and determine -- it wouldn't have  
18 been a ripe motion if we had made the motion earlier because,  
19 number 1, we wouldn't have had all the witnesses to know what  
20 they would say, and some people -- the identities I don't  
21 want to go into, but some of the people we found through  
22 investigation, not through necessarily that -- they're not  
23 all on the telephone calls; there are only a couple that are  
24 on the telephone calls. Some of these other witnesses were  
25 found through investigation, and that investigation was not



1 entirely within our control in the sense that we're relying  
2 on other people who were working for us in Somalia to -- and  
3 who aren't always in Somalia who have to travel there to do  
4 it, and we had to arrange with their schedule.

5           We did this as rapidly as we could given the  
6 considerable difficulties in managing a case like this  
7 without the kinds of resources that one has with an  
8 institutional foundation, so to speak. But, you know, if  
9 we're talking about -- but, you know, so that's the part  
10 about that. We did this in as prompt a manner as we possibly  
11 could given the difficulties in doing it. And we are under a  
12 considerable handicap not being a government, not being an  
13 institution, and having to operate in this -- in this  
14 situation. And we located these people, identified them. If  
15 we filed a motion before the -- before the trip, it wouldn't  
16 be able to -- we wouldn't be able to give the Court, whether  
17 it's Magistrate Gallo or your Honor, a fair picture of what  
18 these people would be saying and whether or not they would be  
19 witnesses.

20           The other thing is -- and I want to get back again  
21 to alternatives just because I think that when I talked about  
22 Djibouti and Kenya, the government can't have it -- that  
23 takes the safety issue out of it. It's really not an issue.  
24 It's really just an alternative. I've been in cases where --  
25 where it's always a process of -- and the Court can be

1 involved or not involved as much as it wishes in the sense of  
2 fashioning a type of relief that gives the defendant the  
3 benefit of this absolutely essential evidence so we don't  
4 have a trial that's unilateral in evidence and only the  
5 government has an opportunity to develop witnesses, only the  
6 government has an opportunity to develop evidence, that --  
7 one that gives both sides an opportunity to put before the  
8 jury a fair version of what occurred and let the jury decide.  
9 And that's what we're asking for.

10           And my point about the trial is I agree that it's a  
11 firm trial date, and I'm not sure that we can't do it if we  
12 go to Djibouti because that's rather easy, and Kenya; those  
13 are rather easy to arrange. You know, Somalia's a little  
14 more difficult; the lead-up for that first visit took a  
15 significant amount of time because of that, and determining  
16 whether there was safe -- but, you know, we weren't going to  
17 send the lawyers there if it's not a safe situation. We had  
18 to make those determinations. But now that it's been done,  
19 it's a lot easier to arrange having done it once and having  
20 confidence in that and seeing what the situation is like  
21 there on the ground.

22           But to have the trial date be the impediment when  
23 we have this evidence -- and we're doing the best we can for  
24 as long as we can to get this evidence before the Court,  
25 before a jury, I would just ask the Court to consider that as

1 well.

2 THE COURT: Thank you.

3 MR. DRATEL: Thank you, your Honor.

4 MR. DURKIN: Judge, could I be heard?

5 MS. MORENO: Thank you. May I --

6 THE COURT: Well, you've all joined -- you've all  
7 joined in this. Yes, you can be heard, but I'm going to ask  
8 counsel --

9 MS. MORENO: Nothing's been --

10 THE COURT: -- not to be cumulative in their  
11 arguments.

12 MS. MORENO: I won't be, your Honor.

13 THE COURT: All right.

14 MS. MORENO: Very briefly, with respect to the  
15 alternatives that are in our brief, that are in the papers  
16 before the Court, I wanted to highlight that -- again,  
17 addressing the security/safety issue -- we have proposed I  
18 think two or three alternatives for the government to  
19 participate in a Rule 15 discovery process.

20 THE COURT: Okay. This is the -- this is the  
21 difficulty I'm having. You didn't make a motion for specific  
22 alternatives. As I indicated, this motion is made to proceed  
23 with Rule 15 depositions in Somalia at a particular location.  
24 That is what is before me. There were a couple of casual  
25 references to perhaps other things that might be done, but

1 that's not under consideration at this particular point in  
2 time.

3           And to get back to a point that Mr. Dratel was  
4 making where he was in a sense imploring the Court to become  
5 involved in the arrangements, if there are other things that  
6 can be done, this is precisely the reason I asked counsel to  
7 allow Magistrate Judge Gallo to become involved, so that if  
8 there were to be a chance to proceed, that other avenues  
9 might be explored. So is that being foreclosed at this  
10 particular point in time? No. But I'm -- it's very  
11 difficult, if not impossible, for this Court to react to  
12 gauzy alternatives that are being presented at this point in  
13 time, and I hope counsel appreciate that.

14           MS. MORENO: I'm mindful of the Court's comments.  
15 We did include those alternatives in the reply. What I think  
16 I'm hearing the Court say is that certainly a fuller briefing  
17 on these alternatives with the ability of the government to  
18 respond either formally or through discussions with the  
19 government, we're happy to do it. What we're trying to tell  
20 the Court -- and we'll do it with all deliberate speed --  
21 what we're fighting for here are these Rule 15 depositions,  
22 your Honor, because we believe that they are absolutely  
23 critical -- not material, critical -- to the defense in this  
24 case. So I won't belabor and repeat what esteemed co-counsel  
25 has said, but we are happy to engage the government in the

1 discussion of the alternatives and the process with which to  
2 do the Rule 15 depositions.

3 THE COURT: Thank you, Ms. Moreno.

4 MR. DURKIN: Judge, I just want to make sure that  
5 my position is clear from the beginning. I am the one that  
6 asked for the stay. Now, I'm not going to argue the motion  
7 for a stay now, but I am -- I do want to address what I  
8 consider to be constitutional issues that are at stake here  
9 and what I perceive to be, with all due respect, form over  
10 substance with respect to the way this should have been  
11 litigated. I don't disagree that we screwed up when we filed  
12 the first motion, but we filed this on July 10, which was in  
13 advance of -- three months in advance --

14 THE COURT: Actually July 20.

15 MR. DURKIN: We originally filed it on July 10. It  
16 was stricken by your Honor on a technicality, but --

17 THE COURT: Well, you didn't secure a date.

18 MR. DURKIN: I understand that. But I'm simply  
19 saying what I see happening here is I see my client's due  
20 process, effective assistance of counsel, and right to bring  
21 witnesses in his defense at stake with respect to form over  
22 substance.

23 We're telling you -- I told you in my motion for a  
24 stay way back in December that there were people we needed in  
25 Somalia. I didn't think we could find them, but I said we

1 needed them. That's why I asked for the stay. You said that  
2 my request then was gauzy, as you've just said here. I  
3 understand it was gauzy; it was gauzy then --

4 THE COURT: But it was made with respect to a  
5 trial -- a much earlier trial date, and at the time I  
6 indicated, you know, it may be moot because if the trial date  
7 is moved, that gives you quite a period of additional time.

8 MR. DURKIN: I understand, and I don't -- I don't  
9 quarrel with that. I'm simply saying -- I'm talking about  
10 vis-a-vis my client's due process rights here, you know, and  
11 his right to a fair trial. I started yelling about this in  
12 December in my formal pleadings that that's what we needed to  
13 do, and I think everybody is now kind of like, you know,  
14 what, there's gambling in the casino with Claude Rains in  
15 Casablanca. I mean this is -- this is the ballgame as far as  
16 we're concerned. I said that back in December, I said it  
17 again in February, I said it -- we said it in April.

18 Now, I agree with you that we screwed up one time,  
19 which is we filed a motion improperly, but everything else --  
20 the idea that somehow the government's right to be able to  
21 respond to pleadings, with all due respect, I think is  
22 totally wrong vis-a-vis what's at stake here. Our clients  
23 are the ones with rights in this courtroom, not the  
24 government. The government has some procedural right I  
25 suppose to respond --

1 THE COURT: Both sides have a right to a fair  
2 trial.

3 MR. DURKIN: But we have constitutional rights to a  
4 fair trial. We're the only ones with real rights in this  
5 courtroom. And what's at stake here is our right to have a  
6 fair trial. And we're now getting caught up in we can't  
7 discuss alternatives today. Well, there are alternatives.  
8 And the only reason we're discussing alternatives is because  
9 the government is the one that insisted that we couldn't do  
10 it in Somalia. We disagreed with that, but they're the ones  
11 that said they didn't feel secure there.

12 So we do have proposals for Djibouti and Kenya, we  
13 do have alternative proposals, and we have to discuss them  
14 today unless you want to grant a continuance, and I want a  
15 continuance; I don't know about anybody else, but I want a  
16 continuance, just like I wanted a stay. This is critical.  
17 These witnesses are material to this defense. These  
18 witnesses negate the government's case. This is the most  
19 classic Rule 15 evidence I've ever seen, and I've been  
20 involved in Rule 15s three other times in my career. It's  
21 usually the government asking for it. I've never seen the  
22 government put through hoops like this with respect to their  
23 request for Rule 15 depositions. The government -- whenever  
24 the government, in my experience -- and I don't mean this  
25 critically of you -- I'm simply saying in my experience in

1 federal courts in this country, what usually happens is the  
2 government comes in and they say we want these depositions,  
3 and then when everybody beefs about it that there's  
4 constitutional issues or there's all these issues of  
5 identification, all the other technical things they raise,  
6 they say well, that can all be raised regarding the  
7 admissibility, and that's what happens, and the government  
8 usually gets the depositions. All we want is the same thing.

9 And I'm telling you, judge, as an officer of this  
10 Court, I can't try this case in October or any other time if  
11 I can't have these because that's my theory of the defense.  
12 My guy's on the caboose in this case. My guy is at the very  
13 tail end here with only having conversations with Mr. Moalin,  
14 and I have Mr. Moalin's counsel saying he's innocent because  
15 they don't even have the right person.

16 I have to have that evidence or I have to have a  
17 separate trial or have to have something. And I don't mean  
18 to get emotional, but this is -- this is the ballgame as far  
19 as I'm concerned. I believe I have a defense here, a valid  
20 defense, and we should be able to call him. And the only  
21 people who could possibly be prejudiced by continuing this  
22 case are our clients, and they're willing to sit because it's  
23 important enough for them.

24 So that's all I want to argue now. If we're only  
25 going to do a Rule 15 -- if we're just arguing a Rule 15,



1 then I say let's forget about the timeliness issue. That's  
2 your biggest concern -- and I understand that --

3 THE COURT: It's not my biggest concern. Don't  
4 attempt to paraphrase my thoughts or my concerns.

5 MR. DURKIN: I didn't mean it --

6 THE COURT: -- Mr. Durkin.

7 MR. DURKIN: -- that way. I thought you said that  
8 you had concerns about timeliness, and I --

9 THE COURT: I do have concerns timeliness because  
10 that's one of the elements the Court has to take into  
11 account.

12 MR. DURKIN: But it's only one of the elements.

13 THE COURT: It's only one of the elements, and I'm  
14 well aware of that. Thank you for bringing the torch of  
15 enlightenment to this dark chamber, Mr. Durkin. I appreciate  
16 it. I'm dealing with several elements that I have to  
17 weigh --

18 MR. DURKIN: I understand that.

19 THE COURT: -- interplay. And I'm very much aware  
20 of what the due process rights of --

21 MR. DURKIN: Okay.

22 THE COURT: -- your -- of all of these gentlemen  
23 are.

24 MR. DURKIN: Okay. Well, and I wanted -- I wanted  
25 to put it on the record because I don't think we should get

1 beat by form over substance. Thank you.

2 THE COURT: Mr. Cole?

3 MR. COLE: Thank you, your Honor. I think our  
4 papers cover it. The only thing I'm going to mention is that  
5 we also were responding only to the relief requested in the  
6 motion. We saw the request to go to Mogadishu as a  
7 nonstarter. It seems quite obvious a nonstarter,  
8 particularly when coupled with untimeliness. If there's some  
9 other proposal, that's not what's been moved upon, it's not  
10 what's before us. We're happy to consult with counsel on any  
11 other proposal, we are not -- our position is not that they  
12 can't have this evidence. Our position is these depositions  
13 should not take place in Somalia at this point for all the  
14 reasons in our papers. We prefer these witnesses to come  
15 into court and be on the stand and be cross-examined. We  
16 would like to work with the defense to see if we can get them  
17 here. If the defense wants to get them somewhere else,  
18 that's a possibility. Other than the brief reference in the  
19 rely brief, they've never contacted us about it to discuss  
20 it. Our phone's never rung for a conversation about how  
21 about Djibouti, what would it take, when could we do it, how  
22 do we do it. It's never rung with respect to hey, do you  
23 think that one guy, witness number 7, do you think he could  
24 get a visa, could you help us, government. Those have never  
25 happened. What's happened is only what's in the papers.

1 That's what we responded to. And for the reasons stated in  
2 the papers, we think the motion should be denied.

3 THE COURT: Okay. I'm going to take this matter  
4 under submission, and regardless, I'll repeat what I asked  
5 all counsel to do over three months ago: See Judge Gallo to  
6 discuss what alternatives may be in the cards here.

7 MR. DRATEL: Your Honor, may I ask just a question  
8 about procedure?

9 THE COURT: Yes, sir.

10 MR. DRATEL: We'll obviously discuss with the  
11 government and we'll discuss it with Magistrate Judge Gallo.  
12 If the motion changes character in terms of a place, should  
13 we be telling Judge Gallo and he will communicate with you or  
14 should we communicate with you directly through papers --

15 THE COURT: Doesn't that really depend on what  
16 happens between the parties and with the assistance of Judge  
17 Gallo? If, for example, you're able to reach a stipulation  
18 in this case for depositions to go forward or some other  
19 alternative to what we would recognize as traditional  
20 depositions, then that might be the end of it right there, a  
21 stipulation and an order. If the parties aren't able to  
22 agree and there's a further request, you can certainly file  
23 that request on shortened notice, and we can telescope a  
24 briefing schedule here and deal with it on that basis.  
25 That's all I'm asking at this point. I'm asking at this

1 point what I was asking back in April of this year.

2 MR. DRATEL: Thank you, your Honor.

3 THE COURT: Okay. Mr. Cole?

4 MR. COLE: One thing also, that to the extent  
5 expediting any evidence that would be taken as well as  
6 expediting the trial, one thing that was raised by the  
7 parties today is issues with transcripts we provided them.  
8 We think it's critical to expedite the trial or any  
9 depositions that would take place, that the defense confer  
10 with us if they think there are problems with the  
11 transcripts. We'd like to see their transcripts, and we'd  
12 like to work out through collaboration if there are problems  
13 with the transcript, get an agreed-upon set to the extent  
14 possible. That's really going to speed things up. So we  
15 would request provision of their transcripts to us as we  
16 provided ours to them.

17 THE COURT: Who'd like to speak to that? Mr.  
18 Dratel, I think -- who was discussing that initially?

19 MR. DRATEL: Ms. Fontier would --

20 THE COURT: Ms. Fontier was, but I know you're both  
21 representing --

22 MR. DRATEL: We just got the transcript Monday  
23 obviously and --

24 THE COURT: Yes.

25 MR. DRATEL: -- came out here yesterday. I don't

1 know if I can speak for everyone about what everyone's  
2 position is, but we will obviously at least -- we hear what  
3 Mr. Cole says.

4 THE COURT: Well, I think it's important for you to  
5 sit down, and -- another discovery matter has arisen here. I  
6 don't see why you couldn't take this up with Magistrate Judge  
7 Gallo if in fact you're having difficulty amongst yourselves  
8 sitting down and working out some kind of protocol to check  
9 for accuracy on any of these transcripts.

10 Now, I know you have a lot of transcripts; you  
11 have, what 1800 intercepts or whatever all together? And I  
12 know that you were receiving either no transcript or a  
13 partial transcript with respect to the vast majority of those  
14 calls that were provided to you, those intercepts. But as I  
15 recall, there's only about 126 intercepts that were  
16 identified by the government as pertinent, and so you're  
17 dealing with a finite group of intercepts there and probably  
18 a much smaller number of intercepts that form the basis of  
19 the charges here, so I would think that that's something that  
20 the parties, if they wish to work together to get an  
21 agreed-upon transcript, could start working on immediately  
22 and with a good likelihood of achieving success.

23 MR. DRATEL: Thank you, your Honor.

24 THE COURT: Okay. So that would be my suggestion  
25 at this point. And obviously it's imperative that an

1 agreed-upon translation of the core intercepts be achieved  
2 before going to trial.

3 MR. DRATEL: I will say part of it is an ongoing  
4 process on our end because we -- in terms of the resources  
5 that we have in terms of translating, we started out with a  
6 certain type of protocol in order to try to identify  
7 discrepancies, and then once we see a material discrepancy,  
8 then we go for a verbatim. One of these -- some of these  
9 conversations are 45 minutes to an hour long. It's not --  
10 even though it's -- even though it's only 126 calls, it's not  
11 hello and goodbye; some of them are rather lengthy. So it's  
12 a -- it's a time-consuming process for the interpreters, and  
13 as you know, they're not -- you know, there are so few  
14 available.

15 THE COURT: Right. And that segues into the next  
16 issue I wanted to bring up, just to make sure you're doing  
17 okay on translators, but before do I that, you know, these  
18 pertinent conversations were -- they were provided some time  
19 ago as I recall. I know they weren't provided all at one  
20 time, Mr. Cole, but when was the last of them provided to the  
21 defense?

22 MR. COLE: I think there's been, this year, in  
23 2012, a handful of new transcripts, like parts that weren't  
24 transcribed before, literally like less than ten, maybe four  
25 or five, where we gave a transcript of a call that hadn't

1 been provided before. My best recollection, your Honor --  
2 and counsel, if we go back and look at our discovery logs, I  
3 may be wrong, so I'm not trying to assert it with certainty,  
4 I don't have the discovery log in front of me -- but I'm  
5 thinking that the vast -- just about all of those went over  
6 in -- at least in 2011.

7 That said, we are -- to make the review easy, we  
8 are preparing to give out to defense counsel a binder with an  
9 even further refined reduced number that we really care about  
10 for its case-in-chief. And if they want to give us whatever  
11 they have on a rolling basis of questions about the  
12 transcripts, we'll be happy to look at it and get back to  
13 them and see if we can reach resolution.

14 THE COURT: Thank you. Then getting back into the  
15 matter of translators, last time we were together, I know we  
16 had a relatively brief discussion about that. There was some  
17 concern at the time that you had enough resource there, that  
18 you had translators to assist, and I know the -- I think it  
19 was the government was going to provide a list of people who  
20 might be of assistance to the defense who were not FBI  
21 employees or contractors. Is there still a concern with  
22 respect to translators?

23 MS. MORENO: No, your Honor. We have one  
24 translator --

25 THE COURT: Okay.

1 MS. MORENO: -- who is certified in fact and has  
2 been working on this case exclusively. The list that was  
3 provided -- I think there were three or four names -- months  
4 ago by the government, they were contacted. None of them --  
5 all of them had a conflict.

6 THE COURT: Okay.

7 MS. MORENO: So we have located a translator who's  
8 exclusively working for us and has no conflict on these  
9 calls. I have a question about the protocol issue because  
10 I'm concerned about this. If there is no agreement about the  
11 translation between the parties, is there a certain protocol  
12 that the Court is envisioning in terms of how that would play  
13 out?

14 THE COURT: Not at this point.

15 MS. MORENO: Okay. But to answer your question, we  
16 do have a translator.

17 THE COURT: Thank you. Okay. Any other issues  
18 that we need to discuss or consider?

19 MR. DURKIN: Judge, can I address my motion?

20 THE COURT: You mean the stay, motion for stay?

21 MR. DURKIN: Yeah or, in the alternative, to  
22 continue.

23 THE COURT: Well, why don't you -- if you'd like to  
24 remain there, that's fine, Mr. Dratel. As I went through  
25 your motion for a stay, I was obviously impressed by how



1 substantially it was tethered to an anticipated grant of Rule  
2 15 depositions as they're presently being requested. I think  
3 that was the -- I think that was the real underpinning of  
4 your motion for a stay. But if there's something else you  
5 wanted to address, you certainly may. It seemed to me to  
6 make better sense to allow the Court to rule on the present  
7 motion for the Rule 15 depositions and then to see where we  
8 are after that. But go ahead, sir.

9 MR. DURKIN: Here's -- here's what I had in mind  
10 and the reason I made it in the alternative, to continue the  
11 trial date. I mentioned on page 3 of my pleading in the  
12 footnote about the alternative arrangements that might be  
13 made in Djibouti or Kenya. I think, and particularly now  
14 that you've suggested that we can try -- and the government  
15 has taken the position that they're not opposing taking the  
16 depositions, they're only opposing the taking of them in  
17 Somalia -- I'm pretty confident that we should be able to  
18 work something out with the magistrate that will be  
19 acceptable to you if that's how it works. I think that's --

20 THE COURT: Well, no, no, not really. That's not  
21 how it works. Actually if it's acceptable to the parties, if  
22 the parties are able to reach agreement and that agreement  
23 envisions the deposition going forward, then, you know, as I  
24 indicated, put it in a stipulation, I'll be happy to sign off  
25 on an order adopting the stipulation as an order of the

1 Court. So I'm assuming that the issues that the government  
2 has raised will somehow be addressed by any arrangements that  
3 seem acceptable to both sides or rendered moot. So that's --

4 MR. DURKIN: What I was referencing is that in  
5 light of how critical this is and in light of the fact that I  
6 had requested it before, I would like to move then to  
7 continue -- and that's why I made the motion in the  
8 alternative -- to continue this trial date because I don't  
9 see how it's possible to try the case in October under either  
10 scenario because right now my entire theory of the defense is  
11 linked to those depositions or at least in significant part,  
12 and I think I can speak for everyone else on that one. But I  
13 don't see how -- I think it's simply a matter of fundamental  
14 fairness we at least be given the opportunity to explore the  
15 other alternatives or try to work this out. I think it's  
16 important enough. And that's why I'd like -- I'd like to get  
17 a continuance today because I don't know how I can try the  
18 case in October. I don't know when you anticipated ruling,  
19 but --

20 THE COURT: I'm going to rule very quickly on this,  
21 so I would -- if I were counsel here, I would anticipate a  
22 ruling within a week --

23 MR. DURKIN: Okay. But --

24 THE COURT: -- but that should not deter counsel  
25 from seeing Judge Gallo at this point and working on

1 alternatives. I think you should -- I think you should work  
2 on alternatives. The ruling is going to be forthcoming. I  
3 have grave concerns, security concerns, which in my view are  
4 of the utmost importance. I know that counsel have just  
5 assumed that it's okay to have government personnel traveling  
6 to Somalia to have these depositions taken at a location  
7 adjacent to the airport, the S.K.A. site, and it's -- it's  
8 extremely dangerous there. You know, you have -- you have a  
9 war-torn, civil-war-torn, ravaged country without any  
10 functioning government, without any functioning judicial  
11 system where terrorist activity is taking place and where the  
12 United States government has absolutely no presence. And  
13 it's asking an awful lot to have this Court send into the  
14 teeth of that kind of a circumstance --

15 MR. DURKIN: You and I see eye to eye --

16 THE COURT: -- prosecutors who will be largely  
17 known at the time of their arrival in this location as people  
18 who are prosecuting members who are allegedly supporting  
19 al-Shabaab. So that's an awful lot to ask of the Court, an  
20 awful lot to ask of the government, and, frankly, an awful  
21 lot to ask of yourselves, to go back into that kind of a  
22 circumstance. You've been fortunate in your earlier  
23 concerns, so -- or your earlier visit, but I still have my  
24 concern, and I want you to know that. And that's a big part  
25 of why I'm asking everyone to do what I suggested months ago,

1 to sit down with Judge Gallo and allow him to manage  
2 discovery issues. I mean what a shock, what a revelation  
3 that Mr. Cole is saying we're willing to sit down and discuss  
4 these things and we can see the possibility of working out  
5 some alternative that is acceptable to everyone. I'm sure  
6 Mr. Cole would have taken that position -- I shouldn't limit  
7 this to Mr. Cole; we have Ms. Han here -- but the government  
8 would have taken that position months ago. And  
9 unfortunately, we are where we are at this particular point  
10 in time, so let's not --

11 MR. DURKIN: No, I understand, but --

12 THE COURT: Go ahead.

13 MR. DURKIN: That's -- you and I don't see  
14 necessarily -- I don't think we're at opposites and that in  
15 fact we see eye to eye. But my whole -- the whole point of  
16 my motion in December was that I wasn't sure we could even go  
17 there to investigate, but I did say in the pleadings that I  
18 thought there was evidence that we needed to obtain there. I  
19 turned out to be right, and -- but I was wrong on whether we  
20 could go there together.

21 I think realistically the alternative -- I mean one  
22 of the problems I have is -- and I don't mean this as  
23 criticism of Mr. Cole; he and I have gotten along fine -- but  
24 whenever we -- we were never told -- whenever we mentioned  
25 going to Somalia, the government never told us to forget

1 about it, nobody can do that. And I -- you know, had we  
2 known that up front, I think we would have probably just  
3 proposed the alternatives right away. What I'm saying is I  
4 think it's very realistic that we can have the alternatives,  
5 but I don't think we can do all that and -- because I  
6 certainly can't do all that and be ready to try this case in  
7 October.

8 THE COURT: You may well be right, Mr. Durkin. I'm  
9 not going to arbitrarily deny motions for continuance even  
10 though the matter has already been continued once, and even  
11 though I'm very concerned about the length of time these  
12 gentlemen have been in custody. I know you are as well, all  
13 of you are, we all are. We all went to get this case to  
14 trial just as soon as practicable and respecting the due  
15 process rights of the parties and ensuring both sides have a  
16 fair trial. I think we're all after that basic goal. Mr.  
17 Cole?

18 MR. DURKIN: So that -- just so I'm clear --

19 THE COURT: I'm not responding, I'm not --

20 MR. DURKIN: -- are you going to rule?

21 THE COURT: I'm not going to rule on a motion to  
22 continue or a motion to stay the action at this point.  
23 You've -- the government hasn't even been given an  
24 opportunity -- you may see that as form or substance; I see  
25 it as basic fairness -- the government has not been given an

1 opportunity to even address the stay issue. If -- and this  
2 is just one conceivable scenario that could play out -- if,  
3 for example, the parties can reach an agreement on  
4 alternatives to Rule 15 depositions going forward in Somalia  
5 but that it's going to take time to arrange and to complete  
6 and to digest all of that, and there's a corresponding  
7 request to continue the trial either agreed to by the  
8 government or opposed, then I'll deal with that at the  
9 appropriate point in time. It's also conceivable that  
10 everybody could be ready if some alternative is agreed upon  
11 quickly and can proceed efficiently. I just don't want to  
12 prejudge that situation now, but I don't think you need to be  
13 concerned about the Court arbitrarily denying a motion to  
14 continue. Actually, the motion to stay the action I think  
15 would -- I think a better way -- to simply stay the action  
16 and have nothing happening in the case is -- should give way  
17 to keeping the case active and then continuing dates as  
18 necessary.

19 MR. DURKIN: So you just enter and continue this  
20 motion? Do you want to set a time for the government to  
21 respond to it or should we -- how should we handle that?

22 THE COURT: Well, I can certainly do that.

23 MR. DURKIN: I'd like that.

24 THE COURT: You're talking about your motion to  
25 stay at this point?

1 MR. DURKIN: Yes. Stay or, in the alternative, to  
2 continue.

3 THE COURT: Okay. But I'm trying -- what I'll  
4 probably end up doing, I'll give the government an  
5 opportunity to respond, but what my inclination at this point  
6 would be to deny an outright motion to stay and to rule upon  
7 a motion to continue the trial date until after the parties  
8 have an opportunity to sit down with Judge Gallo and at least  
9 confer amongst themselves and see what's going on with the  
10 management of this whole issue.

11 MR. DURKIN: Then I'd request you simply enter a  
12 continuance then rather than have to brief it now.

13 THE COURT: All right. I'll -- what I'll do is,  
14 Mr. Durkin, I'll just deal -- I'll address that in the order  
15 addressing the Rule 15 depositions.

16 MR. DURKIN: That's fine.

17 THE COURT: So at least you'll have something of  
18 record. And I appreciate your desire for form and having  
19 this Court rule on the record. After all, we are a court of  
20 record. Thank you. Mr. Cole?

21 MR. DURKIN: Sometimes my Irishness gets me --

22 THE COURT: Understood.

23 MR. DURKIN: It's not on purpose.

24 MR. COLE: And just for the record, we -- unless  
25 the Court desires it, we are -- we have no intention of

1 responding further to the motion to stay. That was  
2 essentially a refiling of the motion already before the Court  
3 that we did respond to. And so we can brief that further,  
4 but we think that's been briefed, and -- we have nothing to  
5 add I guess, your Honor, on the stay.

6 THE COURT: Okay.

7 MR. COLE: As for the motion to continue, we're  
8 very desirous to see the case go forward in October. We do  
9 acknowledge that any alternative we work out with Judge Gallo  
10 that does result in a deposition somewhere else -- or even  
11 results in a witness showing up here at trial, any of those  
12 alternatives may make an --

13 THE COURT: After all, only 66.8 percent -- if I  
14 accept these statistics submitted by the defense, only  
15 66.8 percent of Somalis who have requested a visa for travel  
16 to the United States have been refused, so that leaves  
17 one-third, right --

18 MR. COLE: Right, and we can --

19 THE COURT: -- and we --

20 MR. COLE: -- probably facilitate -- we can  
21 probably do facilitation to try and maybe increase that  
22 percentage. That said, I will grant and agree with the  
23 defense that those are timely processes, and to be in the  
24 position of negotiating in good faith to either take the  
25 depositions somewhere else or to try to get someone into the



1 country, either one of those things is a huge distraction  
2 from the last six weeks before trial here. And so I guess --  
3 I guess that's a long way of saying that we don't want a  
4 continuance, but we also don't want to spend our last six  
5 weeks before trial engaged entirely on a matter that is going  
6 to distract us completely from trial prep.

7 And so with that said, what we'll do is we will  
8 meet with counsel as soon as we can, see Judge Gallo as soon  
9 as we can, and then get back to your Honor with proposals.  
10 And if that proposal involves a continuance that we don't  
11 want but that is necessary, that will come to your Honor.  
12 The only concern I have about that is counsel are all across  
13 the country, and if there is going to be a continuance, is  
14 that something that could be done without appearances again,  
15 or are we going to need to reconvene and have that be  
16 proceeding with all present?

17 THE COURT: Well --

18 MR. COLE: Maybe I'm asking questions that don't  
19 need to be asked right now, your Honor, but I just -- I do  
20 have a concern that, you know, we are -- we are pushing to  
21 have this motion denied because we think it should be denied,  
22 we're seeing there may be alternatives, and yet we're in a  
23 box now on the time, the very short period of time now to  
24 prepare for trial.

25 THE COURT: There's pending before the Court a

1 motion to stay, Mr. Durkin's motion to stay, and indications  
2 from all sides that perhaps a continuance of the trial date  
3 would be appropriate under any and all circumstances as I'm  
4 reading the arguments of counsel.

5           If anyone is in disagreement with that rough  
6 assessment of where we are right now, please state that you  
7 are not in agreement with that summary. I don't see any  
8 responses. So I'm assuming that everyone is basically  
9 requesting, at the very least, some reasonable continuance  
10 to, first of all, deal with the ruling that will come out  
11 with respect to the pending Rule 15 motion, to engage in  
12 further discussions and arrangements between yourselves and  
13 with Judge Gallo for management of some -- any outstanding  
14 discovery, including the Rule 15 request, and to thereafter  
15 prepare for a viable trial date. Are you all in agreement  
16 with that? Is that what --

17           MS. MORENO: Yes, your Honor. And if I may speak  
18 for I believe the entire defense team here, that it is our  
19 intention to approach the government today, meet with them  
20 today with respect to a viable discussion on alternatives,  
21 addressing specifically security issues that touch upon the  
22 alternatives that were mentioned before your Honor. I would  
23 point out we have scheduled a September 14 trial readiness  
24 date already with the Court; is that --

25           THE COURT: And you have your motions in limine

1 briefing schedule set as well obviously with motions in  
2 limine to be heard about ten days before your trial date. So  
3 that's a very good point you raise. I mean you'd have to  
4 standard scrambling on a few other fronts in order to comply  
5 with the present schedule.

6 MS. MORENO: And if there is some fruitful  
7 production out of the discussions with the government with  
8 respect to alternatives, viable alternatives, that move the  
9 Rule 15s forward, would that be something that the Court  
10 would consider with respect to this September 14 trial  
11 readiness date? Perhaps we could come back before the Court  
12 then. I'm trying to take the temperature of the Court's  
13 thinking in all these alternatives because we're going to all  
14 leave here in a day and scatter.

15 THE COURT: Well, okay. You really need to work  
16 diligently amongst yourselves, both sides, and you're working  
17 on a couple of different fronts as I see it, and I won't  
18 repeat what's already been said. You know where the rubber  
19 needs to meet the road here.

20 With respect to the trial date and your other  
21 pending dates, discuss that issue separately. And what you  
22 might do is come up with a new schedule of dates that you  
23 feel would work for you, assuming that you're going to be  
24 involved with your discussions here for some period of time,  
25 and if arrangements can go forward for some form of Rule 15

1 depositions somewhere, that will necessitate time as well.  
2 So build all of that in. If you need to come back with a  
3 proposed new schedule of dates, then I would suggest that Mr.  
4 Cole and/or Ms. Han and perhaps one individual representing  
5 all of the entire defense community here meet with me here in  
6 chambers, and we can work that out. I don't need to see  
7 counsel coming from all over the country. Obviously it would  
8 only be a scheduling matter, so these gentlemen would not  
9 need to be present. And you could arrange that at any time;  
10 you can call chambers, and we would try to arrange something  
11 for you. So that's more or less where things are right now.

12 MS. FONTIER: Thank you very much, your Honor.

13 THE COURT: I think the parties still want and need  
14 a ruling on the pending Rule 15 motion; that's not being  
15 withdrawn as I understand it, so I will go ahead and get that  
16 order out. It will obviously express some concerns I have,  
17 many of which have been mentioned today. But don't let that  
18 chill your efforts to immediately get cracking on this and  
19 working on alternatives, all right?

20 Anything else with respect to discovery? Let's  
21 assume that we weren't even dealing with a Rule 15, there  
22 were no Rule 15 prospective deponents; let's assume that  
23 otherwise the case is where it is right now. I assume the  
24 parties would be ready to proceed to trial, that there are no  
25 other discovery issues or other impediments to the case going

1 forward as presently set.

2 MR. GHAPPOUR: Your Honor, I just wanted to notice  
3 the Court that we'll probably be supplementing our bill of  
4 particulars on the basis of this new --

5 THE COURT: I'm sorry. You'll be supplementing --

6 MR. GHAPPOUR: -- the bill of particulars that was  
7 filed back in February or December on the basis of the new  
8 indictment.

9 THE COURT: Okay.

10 MS. MORENO: And also, your Honor, we just received  
11 in the last few days more discovery from the government, some  
12 of which is redacted. I spoke to Mr. Cole this morning in an  
13 effort to try to understand what that -- the substance of the  
14 redactions, the grounds for it, et cetera. We're going to  
15 discuss that further, but that might be something that we may  
16 have to bring before the Court with respect to discovery.  
17 And it's -- as I said, the production was, I don't know,  
18 maybe three, four days ago, on this new redacted material.

19 THE COURT: Okay. I assume all defense counsel  
20 have conferred with their clients on the matter of the trial  
21 being continued if in fact it is necessary to continue the  
22 trial, and everyone is in agreement, the individual  
23 defendants are in agreement; is that correct?

24 (Affirmative voices.)

25 THE COURT: All right. And all trial counsel have

1 indicated their affirmative responses to that. Anything else  
2 before we break? All right. Listen, get together and get an  
3 alternative schedule, you know, in the works if in fact  
4 everyone seems to be on board with the necessity for moving  
5 some dates, and then let's get that schedule set just as soon  
6 as possible.

7 MR. DURKIN: Could I just have one minute to speak  
8 to my client?

9 THE COURT: Certainly. Gentlemen, I assume it's  
10 okay counsel have a moment with their clients?

11 (The proceedings were concluded.)  
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Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated September 10, 2012 at San Diego, California.

***Debra M. Henson***

/s/ Debra M. Henson (electronic)  
Debra M. Henson  
Official Court Reporter